

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Petition for Reconsideration)	
)	
Request for Review of the)	
Decision of the)	
Universal Service Administrator by)	
)	
Chawanakee Joint Elementary School District	)	File No. SLD-229391
North Fork, California)	
)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors of the	)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

ORDER ON RECONSIDERATION

Adopted: November 8, 2002

Released: November 12, 2002

By the Wireline Competition Bureau:

1. Before the Wireline Competition Bureau is a Petition for Reconsideration filed by Chawanakee Joint Elementary School District (Chawanakee), North Fork, California.¹ In its Petition, Chawanakee seeks reconsideration of our decision dismissing its request for review of the rejection of its Funding Year 2001 application for universal service discounts by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company.² In our

¹ *Petition for Reconsideration by Chawanakee Joint Elementary School District*, CC Docket Nos. 96-45 and 97-21, Petition for Reconsideration, filed June 20, 2002 (Petition for Reconsideration). Although the pleading is captioned as an application for review by the full Commission pursuant to 47 C.F.R. § 1.115, Chawanakee also states that the appeal may be treated as a petition for reconsideration pursuant to 41 C.F.R. § 1.106. Petition for Reconsideration at n.8.

² See *Request for Review of the Decision of the Universal Service Administrator by Chawanakee Joint Elementary School District*, CC Docket Nos. 96-45 and 97-21, Request for Review, filed September 6, 2001 (Request for Review). Previously, this funding period would be referred to as Funding Year 4. Funding periods are now described by the year in which the funding period stands. Thus the funding period which began on July 1, 2001 and ends on June 30, 2002 is now called Funding Year 2001. The funding period which began on July 1, 2002 and ends on June 30, 2003, previously described as Funding Year 5, is now called Funding Year 2002, and so on.

decision, we dismissed the Request for Review as untimely.³ Chawanakee asserts that the request for review is timely under Commission regulations and the provisions of the Paperwork Reduction Act (PRA).⁴ For the reasons set forth below, we deny the Petition for Reconsideration.

2. At issue is SLD's final decision on Chawanakee's Funding Year 2001 application for discounts, which SLD issued on August 6, 2001.⁵ Section 54.720 of the Commission's rules requires requests for review of all Administrator decisions to be filed within 30 days of the issuance of the decision. Chawanakee did not file its Request for Review with the Commission until 31 days after the issuance of SLD's decision, but argued that the request for review was timely because Chawanakee's arguments rested on the legal protections provided to persons under section 3512 of the Paperwork Reduction Act (PRA) in connection with federal collections of information.⁶ Section 3512(b) of the PRA provides that "[t]he protection provided by this section may be raised . . . at any time during the agency administrative process or judicial action applicable thereto."

3. We found that this provision did not save the request for review because section 3512(b) permitted PRA arguments to be raised only where a proceeding was "ongoing."⁸ Because the 30-day period for filing a request for review of the Administrator's decision had elapsed, we concluded, the instant proceeding was not ongoing.⁹

4. In its Petition for Reconsideration, Chawanakee does not dispute that a PRA argument may only be raised in an ongoing proceeding.¹⁰ It argues, however, that the instant proceeding was ongoing at the time when it filed its Request for Review because of section 1.117 of the Commission's rules.¹¹ Section 1.117 provides that, "[w]ithin 40 days after public notice is given of any action taken pursuant to delegated authority, the Commission may on its own motion order the record of the proceeding before it for review."¹² Chawanakee argues that,

³ See *Request for Review by Chawanakee Joint Elementary School District, Federal-Slate Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-229391, CC Dockets No. 96-45 and 97-21, Order, DA 02-1211 (Wireline Comp. Bur. rel. May 23, 2002) (*Chawanakee Order*).

⁴ See Petition for Reconsideration

⁵ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Craig Treber, Chawanakee Joint School District, dated August 6, 2001.

⁶ See Paperwork Reduction Act (PRA), 44 U.S.C. § 3501 *et seq.*

⁷ 44 U.S.C. § 3512(b)

⁸ *Chawanakee Order*, para. 5

⁹ *Id.*

¹⁰ Petition at 4

¹¹ *Id.* at 3-4

¹² 47 C.F.R. § 1.117(a)

within this 40-day period, the Commission “retains jurisdiction” and therefore, the administrative proceeding is ongoing.¹³ Chawanakee further argues that this 40-day period is applicable to SLD’s rejection of Chawanakee’s application because “SLD was acting pursuant to delegated authority.”¹⁴ Because Chawanakee submitted its Request for Review within 40 days of the relevant SLD decision, it argues, it submitted its Request for Review while the proceeding was ongoing and its PRA argument must be considered on the merits.¹⁵

5. We find, however, that the 40-day period provided under section 1.117 for *sua sponte* Commission review of actions taken pursuant to delegated authority is not applicable to the SLD decision on appeal because an SLD decision is not an action taken “pursuant to delegated authority” for purposes of section 1.117.¹⁶ The meaning of the term “delegated authority” is provided by section 5(c)(1) of the Act, which provides that the Commission may “delegate any of its functions [with certain exceptions] to a panel of commissioners, an individual commissioner, an employee board, or an individual employee.”¹⁷ Neither the Administrator nor SLD qualifies as a commissioner, employee or board of employees of the Commission. Thus, the authority granted to it under Commission rules does not constitute “delegated authority” for purposes of section 1.117.

6. Further, to interpret actions taken pursuant to “delegated authority” in section 1.117 as including SLD decisions would be unreasonable in light of the use of that term in sections 1.106 and 1.115. These sections provide, respectively, that a party may file with the Commission a petition for reconsideration of “actions taken pursuant to delegated authority” or an Application for Review by the full Commission of “an action taken pursuant to delegated authority.”¹⁸ Indeed, if Chawanakee were correct, the request for review provided by section 54.719 as an avenue to appeal Administrator decisions would be redundant, because a party seeking Commission review of **an** SLD decision could file a petition for reconsideration or application for review pursuant to section 1.106 or 1.115. Thus, Chawanakee’s interpretation is plainly unreasonable and inconsistent with our rules. We conclude that SLD actions are not actions “taken pursuant to delegated authority” under section 1.117. Because section 1.117’s 40-day period for *sua sponte* review did not apply to the SLD decision, the relevant administrative proceeding was not ongoing when Chawanakee filed its appeal of that decision after the expiration of the 30-day appeal period, and the request for review was thus correctly dismissed as untimely under the Commission’s rules.

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *Id.* at 3-4.

¹⁶ We therefore need not decide whether a Commission proceeding otherwise resolved is still “ongoing” for PRA purposes solely because of the possibility that the Commission *may* exercise its discretion under section 1.117 to review an action.

¹⁷ 5 U.S.C. § 155(c)(1). *See also* 47 C.F.R. §§ 0.11(c), 0.201(a) (listing the three basic categories of delegations “pursuant to section 5(c)”).

¹⁸ 47 C.F.R. §§ 1.106(a)(1), 1.115(a).

7. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.106, that the Petition for Reconsideration filed by Chawanakee Joint Elementary School District, North Fork, California, on June 20, 2002 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey ✓
Deputy Chief, Wireline Competition Bureau

EXHIBIT 2

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Request for Review of the)	
Decision of the)	
Universal Service Administrator by)	
)	
Chawanakee Joint Elementary School District		File No. SLD-229391
North Fork, California		
)	
Federal-State Joint Board on		CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors of the		CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

ORDER

Adopted: May 20, 2002

Released: May 23, 2002

By the Wireline Competition Bureau:

1. This Order dismisses the Request for Review filed by Chawanakee Joint Elementary School District (Chawanakee), North Fork, California.¹ Chawanakee seeks review of a decision issued by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator) on August 6, 2001.² The Commission received Chawanakee's Request for Review on September 6, 2001.³ For requests seeking review of decisions issued before August 13, 2001, under section 54.720(b) of the Commission's rules, any such appeal must be filed with the Commission or SLD within 30 days of the issuance of the decision that the party seeks to have reviewed! Documents are considered to be filed with the Commission only upon receipt.⁴ The 30-day deadline contained in section 54.720(b) of the

¹ Request for Review of the Decision of the Universal Service Administrator *by* Chawanakee Joint Elementary School District, CC Docket Nos. 96-45 and 97-21, Request for Review, filed September 6, 2001 (Request for Review).

² See Request for Review; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Craig Treber, Chawanakee Joint School District, dated August 6, 2001 (Administrator's Decision on Waiver Request). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

³ See Request for Review.

⁴ 47 C.F.R. § 54.720(b)

⁵ 47 C.F.R. § 1.7

Commission's rules applies to all such requests for review tiled by a party affected by a decision issued by the Administrator!

2. Chawanakee argues that it did not receive the Administrator's Decision on Waiver Request until at least August 13, 2001.⁷ However, this does not demonstrate that the Request for Review is timely because the 30-day period is measured from the date of issuance, not the date of receipt!

3. Chawanakee also argues that its Request for Review should be considered without regard to whether it was filed within the 30-day appeal period because Chawanakee's argument rests on the legal protections provided to persons under section 3512 of the Paperwork Reduction Act (PRA) in connection with federal collections of information? Chawanakee argues that its application was rejected for failure to comply with a collection of information that was unlawful under the requirements of section 3512 of the PRA.¹⁰ Chawanakee asserts that this argument may be raised even though the 30-day period for filing a Request for Review has passed, pointing to section 3512(b) of the PRA, which provides that "[t]he protection provided by this section may be raised . . . at any time during the agency administrative process or judicial action applicable thereto."

4. In *Saco River Cellular, Inc. v. Federal Communications Commission*, the D.C. Circuit affirmed the Commission's determination in *Portland Cellular Partnership* that section 3512(b) allows an affected party to raise PRA violations at any time in an ongoing administrative proceeding, *i.e.*, so long as "the administrative or judicial process in connection with a particular license or with a particular application continues."¹¹ As a result, a PRA argument may not be waived by a party that does not raise the argument at the first opportunity.¹² However, the party

⁶ We note that, due to recent disruptions in the reliability of the mail service, the 30-day appeal period has been extended by an additional 30 days for requests seeking review of decisions issued on or after August 13, 2001. *See Implementation & Interim Filing Procedures for Filings of Requests for Review, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 01-376 (rel. Dec. 26, 2001), as corrected by *Implementation & Interim Filing Procedures for Filings of Requests for Review, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata (Com. Car. Bur. rel Dec. 28, 2001 and Jan. 4, 2002). Because the Administrator's Decision on Waiver Request was issued before August 13, 2001, the extended appeal period does not apply to Chawanakee.

⁷ Request for Review, at n.5.

⁸ 47 C.F.R. § 54.720.

⁹ *See* Paperwork Reduction Act (PRA), 44 U.S.C. § 3501 *et seq*

¹⁰ Request for Review, at 2-5

¹¹ *See Saco River Cellular, Inc. v. Federal Communications Commission*, 133 F.3d 25, 30-31 (D.C. Cir. 1998); *Portland Cellular Partnership*, 11 FCC Rcd 19997, 20003, paras. 15-16 (1996).

¹² *See Portland Cellular Partnership*, 11 FCC Rcd at 20002-03, para. 14 (" 'Section 3512 may be raised at any time during the life of the matter. The protection cannot be waived. Failure to raise them at an early stage does not preclude later assertion of rights under this section, regardless of any agency or judicial rules to the contrary.' ") (quoting 141 CONG. REC. S5274-75 (Apr. 6, 1995) (statement of Sen. Roth)).

is still required to raise the PRA argument while an administrative or judicial proceeding is “ongoing.” In *Portland Cellular Partnership*, which involved a proceeding to adjudicate competing applications to provide cellular service, the Commission had found that the licensing proceeding was still ongoing when the PRA argument was raised because a timely filed petition for reconsideration of the merits of the Commission’s license award was still pending.¹³

5. Here, in contrast, the administrative proceeding ceased to be ongoing when the time for appeal of the Administrator’s Decision expired without any appeal having been filed. The subsequent filing of an appeal after the matter is closed cannot be considered to constitute part of the ongoing proceeding. If it were, then the requirement that the proceeding be “ongoing” would be meaningless. Therefore, we find that Chawanakee is not entitled to raise a PRA challenge to the application decision, and the Request for Review must be dismissed as untimely in accordance with Commission regulations.

6. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed by Chawanakee Joint Elementary School District, North Fork, California, on September 6, 2001 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Deputy Chief, Wireline Competition Bureau

¹³ *Portland Cellular Partnership*, 11 FCC Rcd at 19999-20000, paras. 7, 9 (noting that Port Cell’s timely tiled petition for reconsideration regarding the grant of license application was still pending): *id.*, 11 FCC Rcd at 2003, para. 16 (“We do not agree . . . that Port Cell is raising its PRA defense outside of the administrative process. Port Cell’s petition for reconsideration is still pending before us, and therefore the administrative process for licensing and operating the cellular system to serve the Portland NECMA is ongoing. Consequently, Port Cell’s motion raising Section 3512 relates to an on-going administrative process.”).

EXHIBIT 3

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June 20, 2002

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RECEIVED

VIA HAND DELIVERY

JUN 20 2002

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
236 Massachusetts Ave., NE
Suite 110
Washington, DC 20002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Chawanakee Joint Elementary School District
Application for Review
File No. SLD-229391
CC Docket Nos. 96-45, 97-21
Billed Entity No. 144045
Form 471 Application No. 229391

Dear Ms. Dortch:

Transmitted herewith, on behalf of Chawanakee Joint Elementary School District ("Chawanakee"), are an original and four (4) copies of its Application for Review. For the reasons set forth in the Application for Review, Chawanakee requests that the Commission grant the Application for Review and resolve the issues raised in Chawanakee's Request for Review filed on September 6, 2001.

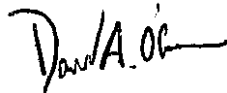
An extra copy of this **filing** is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

Marlene H. Dortch, Esq.
June 20, 2002
Page 2

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "David A. O'Connor".

David A. O'Connor
Counsel **for** Chawanakee Joint Elementary
School District

Enclosure

cc: Universal Service Administrative Company
Schools and Libraries Division
Box 125 – Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981

WAS1 #1096753 v1

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Request for Review by)	
)	
Chawanakee Joint Elementary)	
School District	)	File No. SLD-229391
)	
of Decision of Universal Service)	
Administrator)	
)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors	)	CC Docket No. 97-21
of the National Exchange Carriers)	
Association, Inc.)	

To: The Commission

Re: Chawanakee Joint Elementary School District, Billed Entity Number **144045**
Form **471** Application Number **229391**, Funding Year **4, 7/1/2001- 6/30/2002**

APPLICATION FOR REVIEW

Chawanakee Joint Elementary School District (“Chawanakee”), by its attorneys and pursuant to Sections **1.104(b)**, **1.115**, and **54.722(b)** of the rules of the Federal Communications Commission (“Commission”), **47 C.F.R. §§ 1.104(b)**, **1.115**, **54.722(b)**, hereby submits this Application for Review of the Wireline Competition Bureau’s (“Bureau’s”) **Order** released May **23,2002** in the above-captioned matter.’ This Application for Review is timely filed pursuant to the Commission’s rules. See **47 C.F.R. § 1.115(d)**.

¹ Request for Review of the Universal Service Administrator by Chawanakee Joint Elementary School District, CC Docket Nos. **96-45** and **97-21**, Order, DA 02-1211 (WCB rel. May **23,2002**) (“**Order**”). A copy of the Bureau’s decision is attached hereto as Exhibit 1.

In the *Order*, the Bureau dismissed Chawanakee's Request for Review: stating that the Request was not filed during the 30-day window specified in the Commission's rules for such appeals? However, Chawanakee's Request was based on the provisions of the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3501 *et seq.* Therefore, the applicable deadline for filing such ~~an~~ appeal is set forth in the PRA, which expressly overrules the due date set forth in Part 54 of the Commission's rules, 47 C.F.R. § 54.720.

Requests for relief under the PRA provisions cited in Chawanakee's appeal may be raised "at any time during the agency administrative process" and "[n]otwithstanding any other provision of law" 44 U.S.C. § 3512(a)-(b).⁴ The question, therefore, is whether the appeal was filed during the Commission's administrative process.

The relevant administrative process is set forth in Section 1.117 of the Commission's rules, 47 C.F.R. § 1.117.⁵ Pursuant to Section 1.117, within forty days after public notice of any action taken pursuant to delegated authority, the Commission may on its own motion order the record of the proceeding before it for review. 47 C.F.R. § 1.117; *see also* Chawanakee Request for Review, at 4 n.10 (citing Section 1.117). For purposes of the PRA, therefore, the Commission's administrative process does not conclude until the forty-first day after action has been taken pursuant to delegated authority.

² Request for Review of the Decision of the Universal Service Administrator by Chawanakee Joint Elementary School District, CC Docket Nos. 96-45 and 97-21, Request for Review (filed September 6, 2001) ("Request for Review" or "Review"). A copy of the Request for Review, as supplemented, is attached hereto as Exhibit 2.

³ *Id.* at 1-2, para. 1 (citing 47 C.F.R. § 54.720(b)). At the time that the Chawanakee appeal was filed, the deadline was thirty days from the date of the Schools and Libraries Division's decision. Currently, the deadline is sixty days.

⁴ *See also* *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 244 F.3d 144, 150 (D.C. Cir. 2001); *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 29-30 (D.C. Cir. 1998).

⁵ Commission authority for the promulgation of Section 1.117 is set forth in Section 5(c)(4) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(4).

In this case, the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”) took action on Chawanakee’s application on August 6, 2001. The Commission’s rules establish the SLD as the division within USAC that is delegated authority to administer the Schools and Libraries universal service support mechanism. **See** 47 C.F.R. § 54.701(a), (g). Therefore, for purposes of the Commission’s administrative process, SLD was acting pursuant to delegated authority when it took action on the Chawanakee appeal. Accordingly, pursuant to Section 1.117 of the rules, the Commission had forty days from the date of the SLD’s action (*i.e.*, until September 17, 2001) in which to order the record of the Chawanakee proceeding before it for review. Chawanakee filed its appeal on September 6, 2001. The proceeding therefore continued to be within the “agency administrative process,” within the meaning of the PRA, at the time that Chawanakee filed its PRA appeal, since Commission action on the SLD’s determination was not precluded until September 18, 2001. Because the Commission retained jurisdiction over Chawanakee’s application at the time of Chawanakee’s appeal, and had the discretion to review the SLD’s action concerning Chawanakee’s application, Chawanakee’s PRA argument must be deemed to have been made “during the [Commission’s] administrative process.” PRA § 3512(b). Consequently, the Bureau was required to consider the merits of Chawanakee’s PRA argument.

Chawanakee submits that the Bureau misconstrued the applicable procedures and deadlines for appeals based on the PRA. In the *Order*, the Bureau stated that:

the administrative proceeding ceased to be ongoing when the time for appeal of the [SLD] Decision expired without any appeal having been filed. The subsequent filing of an appeal after the matter is closed cannot be considered to constitute part of the ongoing proceeding. If it were, then the requirement that the proceeding be “ongoing” would be meaningless.⁶

⁶ *Order* at 3, para. 5

As an initial matter, the terms “ongoing” and “closed” do not appear in the PRA. Rather, the relevant PRA provision states that the PRA argument may be raised at any time “during the agency administrative process.” As discussed above, the agency administrative process timeline in this instance is set forth in Section 1.117 of the Commission’s rules, which was cited in Chawanakee’s appeal⁷ but was not discussed at all in the Bureau’s *Order*.⁸ The Bureau therefore erred by looking to the deadline for filing an appeal rather than by focusing on the appropriate provisions of Section 1.117. In the limited circumstances raised in Chawanakee’s appeal, the thirty day deadline is irrelevant—it is the forty day period set forth in Section 1.117 that determines whether a party has raised a PRA argument “during the administrative process.”

It is important to note that Chawanakee is not arguing that a PRA objection may be raised at any time. The Bureau appears to state that the “ongoing” requirement is necessary so that timelines are not rendered meaningless. However, Chawanakee is simply arguing that the Bureau misconstrued the appropriate timeline for raising a PRA argument—Chawanakee is not arguing for an open-ended timeline for raising such an argument. Had Chawanakee filed its appeal on or after September 18, 2001, Chawanakee agrees that, unless the Commission had acted before then on its own motion, the school would have been precluded from raising the PRA argument. But because the school raised the PRA argument on September 6, 2001, well before the end of the “agency administrative process” under Section 1.117, the Bureau was required to consider the merits of Chawanakee’s argument.

⁷ Chawanakee Appeal at 4 n.10.

⁸ Because the applicability of Section 1.117 was squarely presented to the Bureau, Chawanakee submits that the Bureau was afforded an opportunity to pass on the issues raised in this Application for Review. Accordingly, the requirements of Section 1.115(c) have been satisfied and an Application for Review is the appropriate appeal. However, to the extent that the Commission wishes the Bureau to reconsider its own decision, then Chawanakee respectfully requests that this appeal be treated as a Petition for Reconsideration pursuant to the provisions of Section 1.106 of the Commission’s rules.

Accordingly, for the reasons set forth above and in Chawanakee's Request for Review, as supplemented, the Commission should grant this Application for Review and resolve the issues raised in the Request for Review.

Respectfully submitted,

Chawanakee Joint Elementary School District



Mark J. Palchick

Alan Y. Naftalin

David A. O'Connor

HOLLAND & KNIGHT LLP

2099 Pennsylvania Ave., N.W., Suite 100

Washington, DC 20006

(202) 955-3000


Its Attorneys

Dated: June 20, 2002

CERTIFICATE OF SERVICE

I, Laura Ledet, an employee of Holland & Knight LLP, hereby certify that on June 20, 2002, I caused a copy of the foregoing Application for Review to be delivered via first-class mail, postage prepaid to the following:

Universal Service Administrative Company
Schools and Libraries Division
Box 125– Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981



Laura Ledet

EXHIBIT 4

Law Offices

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202-955-3000
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September 6, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
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Washington, DC 20554

Re: Chawanakee Joint Elementary School District
Request for Review
CC Docket Nos. 96-45, 97-21
Billed Entity No. 144045
Form 471 Application No. 229391

Dear Ms. Salas:

Transmitted herewith, on behalf of Chawanakee Joint Elementary School District ("Chawanakee"), are an original and four (4) copies of its Request for Review of the decision of the Schools and Libraries Division ("SLD") in the above-captioned proceeding. For the reasons set forth in the Request for Review, Chawanakee requests that the Commission direct SLD to accept Chawanakee's application as having been filed during the SLDs January 2001 filing window.

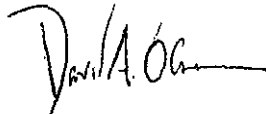
An extra copy of this filing is enclosed. Please date-stamp the extra copy and return ~~it~~ to the courier for return to me.

Magalie Roman Salas, Esq.
September 6, 2001
Page 2

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "David A. O'Connor", with a horizontal line extending from the end of the signature.

David A. O'Connor
Counsel for Chawanakee Joint Elementary
School District

Enclosure

cc: Universal Service Administrative Company
Schools and Libraries Division
Box 125 – Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981

WAS1 #1011234 v1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
Request for Review by)	
)	
Chawanakee Joint Elementary)	
School District	)	File No. SLD-_____
)	
of Decision of Universal Service)	
Administrator)	
)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors	)	CC Docket No. 97-21
of the National Exchange Carriers)	
Association, Inc.)	

To: Accounting Policy Division, Common Carrier Bureau

Re: Chawanakee Joint Elementary School District, Billed Entity Number 144045
Form 471 Application Number 229391, Funding Year 4, 7/1/2001- 6/30/2002

Request for Review

Chawanakee Joint Elementary School District (“Chawanakee”), by its attorneys and pursuant to Sections 54.719(c) and 54.721 of the Commission’s rules, 47 C.F.R. §§ 54.719(c), 54.721, hereby requests a review of the decision of the Schools and Libraries Division (“SLD”) Administrator of the Universal Service Administrative Company regarding Chawanakee’s Year Four Funding Request (Form 471 Application Number 229391).

Chawanakee electronically filed its FCC Form 471 on January 17, 2001.¹ However, Chawanakee did not mail the original signature page or Item 21

¹ A copy of Chawanakee’s FCC Form 471 is attached hereto as Exhibit 1

supplemental attachments to SLD until January 19, 2001, one day after the filing window closed.

By a postcard dated July 10, 2001, SLD notified Chawanakee that its application was received after the January 18 window closed.² On July 26, 2001, Chawanakee filed a Letter of Appeal with the SLD.³ The SLD Administrator denied Chawanakee's appeal, indicating that FCC rules did not permit SLD to consider Chawanakee's request.⁴ Chawanakee now submits this appeal of the SLD Administrator's decision to the Commission.⁵

I. In Attempting to Comply with the Paperwork Reduction Act, the Commission Failed to Comply with the Applicable OMB Approval

The SLD improperly rejected Chawanakee's FCC Form 471 application. While it is not stated, it would appear that Chawanakee's FCC Form 471 was rejected because of the FCC Form 471 instructions that require a paper signature in addition to the electronic signature, and that all attachments must be filed as hard copies within the filing window. These obligations, to the extent that they penalize Chawanakee, are invalid pursuant to the Paperwork Reduction Act ("PRA").

The "public protection" provisions of the PRA are as follows:

² See Exhibit 2.

³ See Exhibit 3.

⁴ See Exhibit 4.

⁵ The SLD Administrator's letter is dated August 6, 2001, which would indicate that the deadline for filing Chawanakee's Request for Review would have been September 5, 2001 if the letter was postmarked the same date as it was dated. See 47 C.F.R. § 54.720(a). However, the Administrator's decision was not received by Chawanakee until August 13, 2001 at the earliest, exactly one week after the date of the letter. See Exhibit 4. Although Chawanakee is unable at this time to locate a copy of the SLD envelope showing a postmark date, it would appear that SLD did not mail the letter until some date after August 6, 2001. In any event, as shown in the text herein, Chawanakee may object to the filing requirements of FCC Form 471 "at any time" during the administrative process, pursuant to Section 3512(b) of the PRA, 44 U.S.C.A. § 3512(b).

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information . . . if—

(1) the collection of information does not display a valid control number assigned by the Director [of the Office of Management and Budget (“OMB”)]. . . or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.⁶

These provisions supersede all other laws. See *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 33 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 813 (1998). In that case, following the enactment in 1995 of the above subsection (b), the Commission was required to entertain, and ultimately grant, a reconsideration request that was filed years late, because the Commission had not complied with the PRA requirements and because Section 3512(b) entitled the petitioner to raise the “protection provided by” subsection (b) “at any time during the agency administrative process” and “[n]otwithstanding any other provision of law.”

There can be no doubt that FCC Form 471 is a “collection of information,” and the Commission did in fact submit it for approval by OMB. On September 1, 2000, OMB conditionally approved an emergency extension of the form,⁷ *subject to the following “Existing Terms of Clearance”*:

On both FCC Form 470 and FCC Form 471, the FCC shall clearly display *at the top of the forms* the following PRA disclosure statement: ‘An agency may

⁶ 44 U.S.C.A. § 3512.

⁷ See Exhibit 5 hereto, page 1.

not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this information collection is #3060-0806.’⁸

On page 1 of the conditional approval, OMB set forth the following:

“NOTE: The agency is required to display the OMB control number and inform respondents of its legal significance (see 5 CFR 1320.5(b)).”⁹

The Commission did not comply with these “terms of clearance.” Instead, the Commission placed only the following statement at the top of the year 2000 electronic edition of FCC Form 471, which Chawanakee used to make its fling:

“Approval by OMB 3060-0806.”

Thus, the FCC Form 471 as used by Chawanakee was not approved by OMB, since it did not display the information notice required pursuant to Section 3512(a)(2) of the PRA, and since it failed to comply with the specific “terms of clearance” outlined by OMB in its approval of Form 471. The consequence of that failure is that Chawanakee should be permitted to supply any missing information at any time that its application is within the administrative process.¹⁰ The OMB regulations implementing the PRA require that where, as here, an agency has imposed a collection of information as a means for proving or satisfying a condition for the receipt of a benefit that is not in compliance with OMB requirements, the agency must

⁸ *Id.* at 2 (emphasis added).

⁹ *Id.* at 1.

¹⁰ To the extent that the Commission determines that this Request for Review was not timely filed, Chawanakee submits that in light of Section 5(c)(4) of the Communications Act, as amended, 47 U.S.C. § 155(c)(4), and Section 1.117 of the Commission’s rules, 47 C.F.R. § 1.117, the Commission retains jurisdiction over this proceeding and the application therefore remains within the administrative process.

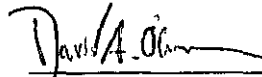
permit a respondent to satisfy the legal conditions in any other reasonable manner.¹¹ In this instance, Chawanakee submits that the most appropriate remedy would be to direct SLD to accept the materials Chawanakee submitted on January 19, 2001, and process the application.

II. Conclusion.

Because Chawanakee cannot be penalized for having failed to comply with the filing requirements of an FCC form that did not comply with the requirements set forth in the OMB approval, and did not display the information notice required by the PRA, Chawanakee urges the Commission to direct SLD to accept Chawanakee's application as having been timely filed during the Year 4 filing window.

Respectfully submitted,

Chawanakee Joint Elementary School District



Mark J. Palchick

Alan Y. Naftalin

David A. O'Connor

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Washington, DC 20006

(202) 955-3000

Its Attorneys

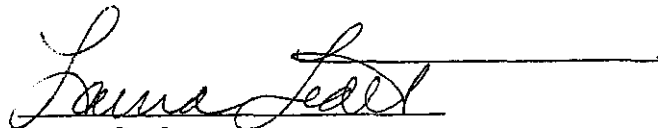
Dated: September 6, 2001

¹¹ 5 C.F.R. § 1320.6(c)

CERTIFICATE OF SERVICE

I, Laura Ledet, an employee of Holland & Knight LLP, hereby certify that on September 6, 2001, I caused a copy of the foregoing Request for Review to be delivered via first-class mail, postage prepaid to the following:

Universal Service Administrative Company
Schools and Libraries Division
Box 125 – Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981



Laura Ledet

EXHIBIT 5

Law Offices

HOLLAND & KNIGHT LLP

2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006-6801

202-955-3000
FAX 202-955-5564
www.hklaw.com

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To Holland & Knight LLP**

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RECEIVED

October 23, 2001

OCT. 23 2001

DAVID A. O'CONNOR
202-828-1889

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Internet Address:
doconnor@hklaw.com

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, DC 20554

Re: Chawanakee Joint Elementary School District
Supplement to Request for Review
CC Docket Nos. 96-45, 97-21
Billed Entity No. 144045
Form 471 Application No. 229391

Dear Ms. Salas:

Transmitted herewith, on behalf of Chawanakee Joint Elementary School District ("Chawanakee"), are an original and four (4) copies of its Supplement to Request for Review of the decision of the Schools and Libraries Division ("SLD") Administrator in the above-captioned proceeding. For the reasons set forth in the Request for Review and in the enclosed Supplement, Chawanakee requests that the Commission direct SLD to accept Chawanakee's application as having been filed during the SLDs January 2001 filing window.

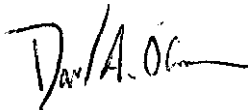
An extra copy of this filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

Magalie Roman Salas, Esq.
October 23, 2001
Page 2

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "D.A. O'Connor", written over the printed name.

David A. O'Connor
Counsel for Chawanakee Joint Elementary
School District

Enclosure

cc: Universal Service Administrative Company
Schools and Libraries Division
Box **125** – Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981

WAS1 #1024716 v1

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

In the Matter of)	
Request for Review by)	
)	
Chawanakee Joint Elementary)	
School District	)	File No. SLD-_____
)	
of Decision of Universal Service)	
Administrator)	
)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors	)	CC Docket No. 97-21
of the National Exchange Carriers)	
Association, Inc.)	

To: Accounting Policy Division, Common Carrier Bureau

Re: Chawanakee Joint Elementary School District, Billed Entity Number 144045
Form 471 Application Number 229391, Funding Year 4, 7/1/2001- 6/30/2002

SUPPLEMENT TO REQUEST FOR REVIEW

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District

October 23, 2001

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Exhibits

Exhibit 1: Chawanakee Letter of Appeal to SLD Dated July 26, 2001

SUMMARY

Chawanakee Joint Elementary School District (“Chawanakee”) is providing the Commission with supplemental information to its Request for Review filed on September 6, 2001. Supplements to Requests for Review have been accepted by the Commission in the past.

In the Supplement, Chawanakee provides additional arguments that the Schools and Libraries Division (“SLD”) wrongfully determined that Chawanakee’s application was not filed during the Year Four filing window. Specifically, Chawanakee argues that, pursuant to the E-Sign Act, the date on which Chawanakee submitted its electronic application and signature is controlling as to the date of submission of its Form 471 application, ~~In addition, the SLD’s~~ duplicative original signature requirement ~~conflicts~~ with the Commission’s statement to the Office of Management and Budget that there would be no duplication of information on FCC Form 471. The SLDs policies with respect to original signatures should not be more onerous than the agency by whom it was established.

Chawanakee also argues that it has satisfied the statutory requirement for submitting a *bona fide* request for E-rate funding, and that its application should be accepted as having been filed during the filing window. The SLDs arbitrary policy of refusing to accept *bona fide* applications based on the date of the postmark of the application should not be allowed to thwart congressional intent.

Finally, in the alternative to the arguments set forth in the Request for Review and this Supplement, Chawanakee requests a waiver of the Year Four filing window for the reasons set forth in Section IV of the Supplement.

BEFORE **THE**
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
Request for Review by)	
)	
Chawanakee Joint Elementary)	
School District	)	File No. SLD-_____
)	
of Decision of Universal Service)	
Administrator)	
)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors	)	CC Docket No. 97-21
of the National Exchange Carriers)	
Association, Inc.)	

To: Accounting Policy Division, Common Carrier Bureau

Re: Chawanakee Joint Elementary School District, Billed Entity Number 144045
Form 471 Application Number 229391, Funding Year **4**, 7/1/2001- 6/30/2002

Supplement to Request **for** Review

Chawanakee Joint Elementary School District (“Chawanakee”), by its attorneys, hereby submits this Supplement to its Request for Review filed on September 6, 2001 with respect to its FCC Form 471 Application Number 229391. This Supplement expands upon Chawanakee’s arguments in support of its contention that the Schools and Libraries Division (“SLD”) erred in denying Chawanakee’s Year Four funding request, and, in the alternative, requests a waiver of the Year Four funding denial for the reasons set forth below.

The submission of supplemental information in a Request for Review proceeding is permitted. Supplemental information has been permitted, for example, in *Request for Review by Naperville Community Unit School District 203*,

Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Order, File No. SLD-203343, CC Dockets No. 96-45 and 97-21, FCC 01-73 (rel. Feb. 27, 2001) (“*Naperville*”). In light of the precedent of *Naperville*, and the D.C. Circuit’s directive to the Commission to accord equal treatment to similarly situated parties, *see, e.g., Melody Music Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), Chawanakee requests that the Commission consider the additional arguments set forth in this Supplement.

I. Pursuant to the E-Sign Act, the Date on Which the Paper Signature Was Mailed To SLD Is Not Relevant to Determining if Form 471 Was Received During the Filing Window.

Chawanakee electronically filed its FCC Form 471 on January 17, 2001. For reasons more fully discussed in Section IV of this Supplement, Chawanakee did not mail the original signature page or Item 21 supplemental attachments to SLD until January 19, 2001, one day after the filing window closed.

The SLD improperly determined that Chawanakee failed to file FCC Form 471 within the filing window. Chawanakee’s electronically signed Form 471 was received by the SLD well within the filing window. Pursuant to the Electronic Signatures in Global and National Commerce Act (“E-Sign Act”), the date that the electronically signed application was received is controlling as the date of submission of the application.

The E-Sign Act went into effect on October 1, 2000.¹ The SLD’s Form 471 for Year 4 is dated October 2000 and therefore is subject to the E-Sign Act.

The E-Sign Act states, in pertinent part:

Section **101**. General **Rule** of Validity.

(a) IN GENERAL. - Notwithstanding any statute, regulation, or other rule of law . . . with respect to any transaction in or affecting interstate or foreign commerce –

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

The term “transaction” is defined as “an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons . . .”² The term “person” includes a government agency such as the FCC,³ meaning that a set of actions relating to the business and commercial affairs between an FCC applicant and the Commission constitutes a “transaction” under the statute, provided that the set of actions affects interstate commerce. Owing to the numerous service providers and schools involved in the E-rate program, Chawanakee submits that the set of actions contemplated by the FCC Form 471 application process “affects” interstate commerce for purposes of the statute. Accordingly, pursuant to the E-Sign Act, FCC E-rate applications may be filed electronically in lieu of being filed in paper form, and electronic signatures

¹ S. 761, 106th Cong., 2d Sess., § 107(a).

² *Id.* § 106(13).

contained in such applications cannot be denied legal effect simply because they were not filed in paper format.

In this instance, SLD specifically requested applicants to complete the “Certification and Signature” block as part of the electronic Form 471 application. Mr. Treber, Chawanakee’s representative, did so and filed the electronic application during the filing window. Because Chawanakee’s electronic Form 471 contained the legally binding electronic signature **of** Chawanakee’s representative, Mr. Treber, Chawanakee submits that SLD was prohibited under the E-Sign Act from requiring Chawanakee to subsequently submit a signature page in paper form. Accordingly, Chawanakee cannot be punished for failure to comply with an impermissible SLD rule. The Commission should therefore direct SLD to deem Chawanakee’s application as having been timely received during the filing window.⁴

In addition, Section 104(c) of the E-Sign Act prohibits state and federal agencies from imposing or reimposing “any requirement that a record be in a tangible printed or paper form.” The only exception to this **rule** is if there is a

³ *Id.* § 106(8).

⁴ This case should be distinguished from previous Commission decisions that were decided prior to the enactment of the E-Sign Act. *See, e.g., Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and the Application of Bruggenteyer Memorial Library*, DA 99-1529, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13,170 (Com. Car. Bur. 1999). In that case, the Commission denied a request for review by an applicant who filed its Form 471 electronically and faxed the signature page to the SLD but did not submit the original signature page to the SLD until after the filing window closed. Chawanakee submits that the E-Sign Act invalidates the rationale underpinning the *Bruggemeyer* decision. Similarly, the Commission’s decision in *Winchendon School* can be distinguished from the present case because the Winchendon application was submitted for Funding Year 3. The application filing window for Funding Year 3 and the relevant FCC forms in use at that time predated the E-Sign Act. *See In re Request for Waiver by The Winchendon School, Winchendon, MA, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-192816, DA 01-2033, Order (Com. Car. Bur. rel. Aug. 28, 2001).

“compelling government interest relating to law enforcement or national security” and imposing a paper requirement is essential to attaining that interest.⁵

In this situation there is no such compelling government interest relating to law enforcement. First, SLD is not a law enforcement agency and lacks law enforcement powers. Second, and more importantly, the prevention of fraud is not a sufficient justification for requiring original signature pages, because such a justification would undermine the very purpose of the E-Sign Act. The Act is designed to legitimize electronic signatures; if Congress intended the prevention of fraud to be a compelling interest justifying an original signature page, Congress would not have enacted the law in the first place.

Finally, the Commission has recognized that the E-Sign Act supersedes its rules. Pursuant to former Section 64.1160(b) of the FCC’s rules, 47 C.F.R. § 64.1160(b), the FCC required long distance carriers to obtain the written signature of new customers. In September 2000, in reaction to the E-Sign Act, the FCC began permitting electronic signatures without the need for the submission of original signatures.⁶ As an agent of the FCC, SLD should not maintain stricter standards than the FCC itself.

⁵ E-Sign Act, § 104(b)(3)(B).

⁶ See 47 C.F.R. § 64.1120(c)(1); see also *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, FCC 00-255 (rel. Aug. 15, 2000) (Letters of Agency may be submitted electronically, without any written original signature requirement). In the decision, the FCC specifically cites as authority the E-Sign Act.

II. Nothing of Value Is Gained by the Duplicative Original Signature Page Requirement.

As a separate matter, Chawanakee submits that the SLDs paper signature submission requirement serves no useful purpose and should not be required.⁷ By inserting a representative name and submitting the Form 471 application electronically, the signatory for Chawanakee completed the “Certification and Signature” portion of the form. The signatory thus certified that the information contained in the application was accurate, and indeed the school was thus bound by that certification in the same way as a paper signature binds the school. Therefore, nothing is gained by a redundant requirement that applicants print out and submit a paper signature to the SLD.

Furthermore, the paper signature requirement runs counter to the representations made to the Office of Management and Budget (“OMB) in the Commission’s application seeking approval of FCC Form 471. In its application to OMB, the Commission stated that “[t]here will be no duplication of information.”⁸ Clearly, a requirement that applicants filing electronically must submit a paper copy of their electronic signature is a duplication of information, particularly when no such burden is placed on applicants filing via mail.

Importantly, the FCC’s own rules and procedures do not require the submission of a paper signature page in addition to the certifications made in electronic filings. Indeed, out of *all* of the available electronic applications that can

⁷ Indeed, the SLD itself seems to have recognized this fact. SLD recently announced that Year 5 applications could be submitted entirely in electronic form. See <http://www.eschoolnews.com/news/showStory.cfm?ArticleID=3029>. This is an administratively appropriate decision and will no doubt expedite the application review process.

be submitted to the FCC, *not one form* requires the applicant to follow up with a signed original. The SLD should not have a more onerous standard than the agency by whom it was established.

111. Congressional Intent **Should** Not Be Thwarted **by** the SLD's Arbitrary Policies.

A. *Congress Intended that Bona Fide Requests of All Eligible Schools for Telecommunications Services Should Be Granted.*

One of the fundamental goals of the universal service provisions of the Telecommunications Act of 1996 was to ensure the ability of K-12 schools and libraries to obtain access to advanced telecommunications services. *See Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Fifth Order on Reconsideration, 13 FCC Rcd 14,915, 14,919 (1998) (citing Joint Explanatory Statement of the Committee of Conference). Section 254(b)(6) of the Communications Act of 1934, as amended, requires the Commission to “base policies for the preservation and advancement of universal service on the following principles: . . . Elementary and secondary schools and classrooms . . . should have access to advanced telecommunications services as described in subsection (h) [of this section].” 47 U.S.C.A. § 254(b)(6). Subsection (h)(1)(B) provides that

[a]ll telecommunications carriers serving a geographic area *shall, upon a bona fide request* for any of its services that are within the definition of universal service. . . provide such services to elementary schools, secondary schools, and libraries *for educational purposes* at rates less than the amounts charged for similar services to other parties.

Id. § 254(h)(1)(B) (emphasis added).

⁸ See Exhibit 4 attached hereto, Supporting Statement, Item A4.

The foregoing makes it clear, and the Commission has recognized, that Congress intended that all eligible schools receive communications service discounts. Indeed, the statute imposes only two requirements on a school desiring discounts. First, the requested services must be for educational purposes. Second, the school must submit a “*bonafide* request.” And the statute commands that when a carrier receives such a request, it “shall” provide service at a discount.

In this case, Chawanakee made a good faith request for telecommunications services to be used for educational purposes. The school’s application is a perfectly good application in all respects. The only reason that SLD denied the application appears to be that, for reasons beyond Chawanakee’s control, the supporting documents to the online application were mailed one day late. However, Chawanakee made a good faith effort to expedite the SLDs receipt of the supporting materials by sending the materials via an overnight carrier.

The overall purpose of the legislation requires SLD and the Commission to overlook minor procedural errors in this instance, in favor of carrying out the Congressional purpose that these telecommunications services be made available to schools and libraries making bona fide requests for such services. Because Chawanakee made a *bonafide* request for telecommunications services, its request should be granted.

B. The *SLD's* Policy ~~of~~ Determining *the Acceptability of* Applications Based on the *Applications'* Postmarked Date is Arbitrary and Capricious.

A reviewing court is required to hold unlawful any agency action determined to be arbitrary or capricious. 5 U.S.C. § 706(2)(A). The SLD has established a cut-off date for accepting mailed applications, based on the postmarked date of the application. Thus, for example, School A could send its application via regular mail on Thursday, January 18 and the application could be received by SLD on Tuesday, January 23. School B's application could be sent via overnight delivery on Friday, January 19 and be received by SLD on Monday, January 22. In this scenario, SLD would accept School A's application and reject School B's application, even though School B's application was received one day earlier than School A's application. The apparent justification for this SLD policy is that it is administratively appropriate to establish a cut-off date in order to expedite the application review process.

The SLD's policy does nothing to forward the purpose of expediting the application review process. Rather, the policy amounts to an arbitrary determination of which applications are acceptable for filing. It is capricious and arbitrary to hold that Chawanakee's application must be denied for having delayed the administrative process when the SLD would accept and process applications that were received after Chawanakee's application was received. Indeed, it is extremely likely that the SLD received Chawanakee's supporting materials well before the SLD received the supporting materials

of schools that chose to send their supporting materials via regular mail on January 18, 2001.

It is important to distinguish the SLD's "postmarked" policy from the Commission's own policy concerning the filing of appeals in E-rate funding decisions. The Commission requires that E-rate appeals be filed within 30 days of a decision by the SLD. This is a clear, consistent policy, because no matter the type of mailing delivery used, the appeal must be received by the Commission on a date certain. In contrast, the SLDs arbitrary policy of basing application acceptability on the postmarked date does not withstand scrutiny under Section 706 of the Administrative Procedure Act, because applications received earlier in time are rejected while those received later in time are accepted. To comport with the requirements of Section 706, SLD must revise its policy to establish a *filing* date deadline that does not discriminate on the basis of postal delivery methods employed by applicants. Until the policy is revised, Chawanakee cannot be penalized for having failed to comply with an arbitrary procedure.

IV. A Waiver of the Year 4 Filing Window Is Warranted and Would Serve the Public Interest.

In its Request for Review, Chawanakee argued that the SLD erred in denying the school's funding request because the Commission derogated from the OMBs specific "Terms of Clearance" instructions set forth in the OMB's approval of FCC Form 471 pursuant to the Paperwork Reduction Act. Because of this derogation, Chawanakee argued that the school could not be penalized for failure to comply with the requirements of FCC Form 471.

Even if the Commission determines that neither the E-Sign Act nor the Commission's derogation from the OMB's Terms of Clearance warrant a grant of Chawanakee's Request for Review, the Commission should nonetheless grant a waiver of the filing window deadline⁹ because the delay in submitting the paper signature and supporting materials to SLD was caused by massive, unforeseeable power blackouts in the school's district during the filing window.

The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. *Federal-State Joint Board on Universal Service, Universal Service Support for Eligible Schools and Libraries, Year 3 Filing Window*, CC Docket No. 96-45, FCC 00-204, Order, 15 FCC Rcd 13,932, 13,934, para. 6 (2000); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

Chawanakee submits that such a situation is presented here. As set forth in Chawanakee's Letter of Appeal to the SLD, a copy of which is attached hereto as Exhibit 1, Chawanakee timely filed its FCC Form 471 application online on the evening of January 17, 2001, and arranged for a pickup by Federal Express of the paper signature and Item 21 supporting materials for the next day. Throughout the day on January 18, 2001, massive and unforeseeable blackouts affected the entire California Central Valley, including Fresno, where the central Federal Express office is located. As a direct result of the blackouts, Federal Express did not make its scheduled pickup of Chawanakee's package. By the time that Chawanakee was

⁹ See 47 C.F.R. § 54.507(c).

informed that Federal Express was unable to make the scheduled pickup, it was too late to arrange for an alternate mail carrier. Accordingly, Chawanakee's package was unable to be sent to the SLD until one day later, January 19, 2001. In any event, as noted above, it is extremely Likely that SLD received Chawanakee's package well before SLD received other schools' packages that were sent by regular mail.

Although the Commission has previously held that weather-related delays **are** not a sufficient justification for a waiver,¹⁰ Chawanakee submits that the facts in this case are distinguishable because the delays at issue here were due to unforeseeable events. The Fresno area was subject ~~to~~ rolling electricity blackouts during the critical final day of the Year **4** filing window. These blackouts caused severe mail disruptions throughout the day on January 18, 2001 and could not have been anticipated by Chawanakee.

Because the delays associated with the blackouts were unforeseeable and

beyond the control of Chawanakee, Chawanakee submits that strict application of the filing window deadline would be unwarranted. The public interest would be served by accepting Chawanakee's application as having been timely filed, so that the students of Chawanakee can benefit from the funds that Congress intended should be available to their school.

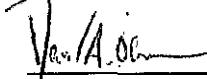
¹⁰ See *In re Request for Waiver by Stephen / Argyle Central School District, Stephen, MN, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange* (continued...)

V. **Conclusion.**

For the reasons set forth in Chawanakee's Request for Review and in this Supplement, the Commission should direct the SLD to accept Chawanakee's FCC Form 471 application as having been timely filed during the SLDs filing window for Year 4.

Respectfully submitted,

Chawanakee Joint Elementary School District



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Its Attorneys

Dated October 23, 2001

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of
Request for Review by

Chawanakee Joint Elementary
School District

of Decision of Universal Service
Administrator

Federal-State Joint Board on
Universal Service

Changes to the Board of Directors
of the National Exchange Carriers
Association, Inc.

File No. SLD-_____

CC Docket No. 96-45

CC Docket No. 97-21

To: Accounting Policy Division, Common Carrier Bureau

Re: Chawanakee Joint Elementary School District, Billed Entity Number 144045
Form 471 Application Number 229391, Funding Year 4, 7/1/2001- 6/30/2002

Supporting Declaration

I, Craig Treber, hereby swear under penalty of perjury of the laws of the United States that I have reviewed the foregoing Supplement to Request for Review ("Supplement"), and that all statements of fact contained within the Supplement, except those for which official notice may be taken, are true and correct to the best of my personal knowledge.

Executed this 17 day of October, 2001.

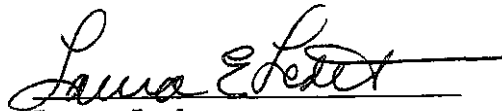


Craig Treber
Technology Director
Chawanakee Joint Elementary School District

CERTIFICATE OF SERVICE

I, Laura Ledet, ~~an~~ employee of Holland & Knight LLP, hereby certify that on October 23, 2001, I caused a copy of the foregoing Supplement to Request for Review to be delivered via first-class mail, postage prepaid to the following:

Universal Service Administrative Company
Schools and Libraries Division
Box 125 – Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981


Laura Ledet